16-396

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 134.

THE TOWN OF RED ROCK, PLAINTIFF IN ERROR,

vs.

JACOB A. HENRY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED NOVEMBER 1, 1879.

The claim is for the time measured by the Sundays for which he was not paid, because *not* employed.

As will be seen by the 5th finding (p. 3), the appellant rendered his accounts monthly "*for my services* as occasional weigher of the customs from to inclusive, *Sundays excepted*," &c., &c., to each one of which was appended a receipt signed by him. Now we submit that, having induced a course of conduct on the part of Government, namely, the continuing him in employment, under the belief that he was to be paid only for the work he actually did, the appellant is not to be heard now to set up, to the prejudice of Government, a claim for compensation over and above what he demanded during the time of his service. Having been silent, "when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent." (96 U. S., 720, *Morgan* vs. *R. R. Co.*; 9 Wall., 273, *Swain* vs. *Seamons*; 10 Wall., 645, *Merchants' Bank* vs. *State Bank*; 1 Wall., 281, *Gregg* vs. *Von Phul*; 4 Hurl. & Norm., 550, *Cornish* vs. *Abington*, and cases referred to.)

We submit that the judgment must be affirmed.

WM. A. MAURY,
Assistant Attorney-General.

16-596

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INDEX.

	Original.	Print.
Writ of error	1	1
Return	2	1
Citation	3	2
Assignment of errors	5	2
Declaration	7	3
Exhibit A (copy of bond)	15	5
B (copy of coupon)	18	6
Summons	20	7
Answer	21	8
Agreed statement of facts	29	10
Order	35	12
Hearing	36	12
Finding of facts and certificate of division	37	12
Amended stipulation as to facts	42	14
Exhibit A (proceedings of town meeting, &c.)	50	16
Bill of costs	58	19
Judgment	60	20
Bond	62	20

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States for the district of Minnesota, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Jacob A. Henry vs. The Town of Red Rock, a manifest error hath happened, to the great damage of the said defendant, The Town of Red Rock, as is said: We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 22nd day of August, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the one hundred and fourth year.

[SEAL.] H. E. MANN,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.
By WM. A. SPENCER,
Dep'y.

2 UNITED STATES OF AMERICA,
District of Minnesota, ss:

The answer of the judges of the circuit court of the United States for the district of Minnesota, in the eighth circuit, in within writ mentioned.

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States of America, within mentioned, in a certain schedule to this writ annexed, marked A, as within it is commanded.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in the district of Minnesota, this 15th day of October, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the one hundred and fourth year.

[SEAL] H. E. MANN,
Clerk U. S. Circuit Court, Dist. of Minnesota,
By WM. A. SPENCER,
Dep'y.

(Indorsed:) U. S. circuit court, district of Minnesota. Jacob A. Henry vs. The Town of Red Rock. Writ of error.

3 United States of America to Jacob A. Henry, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the 8th circuit & district of Minnesota, wherein the Town of Red Rock is plaintiff & you are defendant in error, to show cause, if any there be, why the judgment in the writ of error mentioned should not be corrected & speedy justice should not be done to the parties in that behalf.

Witness the honorable R. R. Nelson, judge of the district court of the district of Minnesota, & one of the judges of said circuit court, this 22nd day of August, 1879.

R. R. NELSON,
Judge U. S. Dist. C't, District of Minnesota.

4 (Indorsed:) U. S. cir. court, dist. of Minnesota. Town of Red Rock, pl'ff in error, vs. Jacob A. Henry, def't in error. Citation. Due service of the within admitted this day of August, 1879.

At'y for Def't in Error.

Gordon E. Cole, att'y for pl'ff in error.

5 *Assignment of error.*

UNITED STATES OF AMERICA,
District of Minnesota:

JACOB A. HENRY
ag'st
THE TOWN OF RED ROCK.

Defendant assigns for error in the judgment heretofore, to wit, at the June term of said court 1879, rendered in favor of the plaintiff & against the defendant—

That said judgment should been in favor of the defendant, and the court erred in rendering the same for the plaintiff: 1st. Because the act under which the bonds & coupons set out in the complaint were issued had been repealed prior to the issue of said bonds; 2d. That the Southern Minnesota Railroad Company did not, after the vote authorizing the issue of said bonds & before the passage of the law repealing the law under which said vote was taken, perform the conditions paramount, neces-

6 sary, & required to be performed by it to entitle it to said bonds; 3d. That plaintiff is not a bona fide purchaser of the bonds to which the coupons in suit were attached or of said coupons, because said bonds do not on this face purport to have been issued under or pursuant to any law in existence at the time of their issue, but by express recital upon their face purport & declare that they were issued under a law or laws which had been repealed before their issue.

GORDON E. COLE,
Def't's Att'y.

Dated Aug. 21, 1879.

(Indorsed:) U. S. cir. c't, dist. of Minnesota. Jacob A. Henry vs. The Town of Red Rock. Assignment of error. Filed Aug. 22, 1879. H. E. Mann, clerk. Gorden E. Cole, def't's att'y.

7 SCHEDULE A.

United States circuit court, district of Minnesota.

JACOB A. HENRY
against
THE TOWN OF RED ROCK.

The complaint of said plaintiff, in this cause, shows to this court and states:

I. That said plaintiff is now and for more than five years last past always has been a resident and citizen of the State of Illinois.

II. That said defendant is now, and during all the time hereinafter stated always has been a public municipal corporation, duly created, organized and existing under and by virtue of the general laws of the State of Minnesota, and situated and being in the county of Mower, in said State of Minnesota, and a citizen thereof.

III. That heretofore and on or about the 9th day of March, 1871,
8 the said defendant, The Town of Red Rock, under and by virtue of an act of the legislature of the State of Minnesota, entitled "An act to authorize the towns in Fillmore, Mower, Freeborn, Faribault, Martin, and Jackson counties to issue bonds to aid in the construction of any railroads running into or through said counties," approved March 6, 1868, and an act amendatory thereof entitled "An act to amend chapter 24 of the special laws of one thousand eight hundred and sixty-eight, entitled 'An act to authorize the towns of Fillmore, Mower, Freeborn, Faribault, Martin, and Jackson counties to issue bonds to aid in the construction of any railroads running into or through the said counties,'" approved February 27, 1869, did duly make and deliver unto the Southern Minnesota Railroad Company, a corporation duly created, organized, and existing under and by virtue of the laws of the State of Minnesota, its twenty-five certain several bonds, numbered from one to twenty-five, both inclusive, duly signed by the chairman of the board of supervisors
9 and town clerk of said Town of Red Rock, and all of which said twenty-five bonds were of the same tenor and date, and numbered from one to twenty-five, both inclusive, and in and by each of which said bonds the said defendant acknowledged itself indebted to said Southern Minnesota Railroad Company, or bearer, in the sum of one thousand dollars, and said defendant thereby promised to pay to the said Southern Minnesota Railroad Company, or bearer of each and every one of said bonds, at or before the expiration of twenty years from the date thereof, the sum of one thousand dollars with interest on that sum at the rate of seven per cent. per annum, payable annually, so long as principal sum should remain unpaid, on the presentation, from time to time, to the treasurer of said defendant of the proper interest warrants, or coupons, thereto attached, as they matured, a copy of one of which said twenty-five bonds numbered 22 is hereto attached marked A, and made a part hereof. That there was then and there annexed to each of said bonds, aforesaid, twenty interest warrants

10 or coupons, each of which were numbered to correspond with said bonds and were duly made and executed by said defendants in pursuance of the said acts of said legislature, as aforesaid, and duly signed by the town clerk and chairman of the board of supervisors of said defendant contemporaneously with the aforesaid bonds, and to which they were annexed respectively at the date of the delivery thereof for the accruing annual interest thereon, a copy of one of which coupons, being coupon for annual interest of $70.00 due on bond numbered 22, on the first day of July, 1872, is hereto attached, marked B, and made a part hereof, and all of which several coupons were of like tenor and form, and in and by each of which the said defendant promised to pay to the said Southern Minnesota Railroad Company, or bearer, seventy dollars for interest due on the said bond, to which the same was attached, at the time specified in each of said coupons; that is to say, the first of said coupons attached and annexed
11 to each of said series of bonds was payable by the terms thereof on the first day of July, 1872; the second of said coupons attached and annexed as aforesaid was payable by the terms thereof on the first day of July, 1873; and so on to the end of the coupons annexed and attached to said series of bonds, thus fixing the time for the payment of the several installments of annual interest to accrue upon each of said bonds of said series of bonds as aforesaid. And said plaintiff further states that each and every bond of said series of bonds showed upon the face thereof the object for which they were issued. That all of the said bonds, with coupons attached as aforesaid, were by the said defendant duly issued and delivered for value received to said Southern Minnesota Railroad Company on or about the said 9th day of March, 1871. That thereafter, and before any of the coupons on said bonds numbered 20, 21, 22, 23, 24, & 25 fell due or matured, the said Southern Minnesota
12 Railroad Company for a valuable consideration to them paid, sold, assigned, and delivered the same, with the said coupons thereto belonging, to this plaintiff, and certain of said coupons on said bonds were thereafter duly presented and duly paid. That thereafter and before the commencement of this action, the interest coupons on said bond numbered 20, represented by proper coupons or interest warrant as aforesaid, for the year ending July 1st, 1872, and for the year ending July 1st, 1875, and for the year ending July 1st, 1876, and for the year ending July 1st, 1877, and on bond numbered 21, for the year ending July 1st, 1872, and
for " " " " 1st, 1875, "
for " " " " 1st, 1876, "
for " " " " 1st, 1877, and
on bond numbered 22, for the year ending July 1st, 1872, and for the year ending July 1st, 1875, and for the year ending July 1, 1876, and for the year ending July 1st, 1877, and on bond numbered 23,
for the year ending July 1st, 1872, and
" " " " July 1st, 1875, and
13 for the year ending July 1st, 1876, and
" " " " July 1st, 1877; and on bond numbered 24, for the year ending July 1st, 1872, and
" " " " July 1st, 1874, and
" " " " July 1st, 1875, and
" " " " July 1st, 1876, and
" " " " July 1st, 1877; and on bond numbered 25

for the year ending July 1st, 1872, and
" " " " " " 1874, and
" " " " " " 1875, and
" " " " " " 1876, and
" " " " " " 1877, were by this plaintiff, on the respective days of the maturity of each of said coupons, duly presented for payment and payment thereof duly demanded, but said defendant failed and refused to pay the same or any of the same, and the same are wholly and entirely unpaid in whole and in part. That there is now due and owing from said defendant to said plaintiff, for the reasons aforesaid, the full sum and amount of eighteen hundred and twenty dollars and interest on four hundred twenty dollars thereof from July 1st, 1872, and interest on one hundred forty dollars thereof from July 1st, 1874, and interest on four hundred twenty dollars thereof from July 1st, 1875, and interest on four hundred twenty dollars thereof from July 1st, 1876, and interest on four hundred twenty dollars thereof from July 1st, 1877.

14

Wherefore plaintiff demands judgment against said defendant for the sum of eighteen hundred and twenty dollars, and interest on four hundred twenty dollars thereof from July 1st, 1872, and interest on one hundred forty dollars thereof from July 1st, 1874, and interest on four hundred twenty dollars thereof from July 1st, 1875, and interest on four hundred twenty dollars thereof from July 1st, 1876, and interest on four hundred and twenty dollars thereof from July 1st, 1877, besides the costs and disbursements of this suit.

ROGERS & ROGERS,
Plaintiff's Attorneys, St. Paul, Minn.

15

EXHIBIT A.

UNITED STATES OF AMERICA:

No. 22.] *Bond of one thousand dollars.* [$1,000.00.

Being one of twenty-five bonds of like amount issued by The Town of Red Rock in aid of the Southern Minnesota Railroad Company (pursuant to chapter 24 of special laws of Minnesota of 1868, as amended by chapter 44 of special laws of Minnesota of 1869).

To all to whom these presents shall come The Town of Red Rock, in the county of Mower and State of Minnesota, sends greeting:

(Across the face in red ink:) $1,000.

Whereas by acts of the legislature of the State of Minnesota, known as chapter 24 of special laws of Minnesota of 1868 and chapter 44 of special laws of Minnesota of 1869, it is in substance enacted that each town in the counties of Fillmore, Mower, Freeborn, Fairbault, Martin, and Jackson is authorized to issue bonds as therein provided, to aid on the construction of any railroad running into or proposed to be built through either or all of said counties, with other provisions prescribing the form and amount of such bonds and mode of voting the same, the time of payment, rate of interest, and manner of providing for payment of the same, with other formalities, all which have been fully complied with in respect to the issuing of these presents; and whereas, at a special town meeting of the legal voters of said town duly called, and which was holden

16

in and for said town on the fifteenth day of May, 1869, it was resolved in pursuance of said acts by a majority of the legal voters of said town present and voting, that said town should issue to the Southern Minnesota Railroad Company twenty-five thousand in bonds in the form herein expressed, and upon certain conditions which said company has since fully performed:

Now, in consideration of the premises, the said Town of Red Rock acknowledges itself indebted to and promises to pay to the said South-
17 ern Minnesota Railroad Company or bearer, at or before the expiration of twenty years from the date hereof, the sum of one thousand dollars lawful money of the United States, on presentation of this obligation to the town treasurer of said town, and also interest on that sum at the rate of seven per cent. per annum, payable annually, so long as said principal sum remains unpaid, on like presentation from time to time to said treasurer of the respective proper interest warrants hereto attached, as they severally mature.

In testimony whereof the said town has caused these presents to be signed by the chairman of the board of supervisors and countersigned by its town clerk this 9th day of March, 1871.

E. W. CONNER,
Chairman of Board of Supervisors.

Countersigned:
D. L. TANNER,
Town Clerk.

18 EXHIBIT B.

$70.] To the treasurer of the Town of Red Rock, Minnesota:

Pay the Southern Minnesota Railroad Company, or bearer, seventy dollars on the first day of July, 1872, for one year's interest on bond No. 22, issued March 9, 1871, in aid of said company.

E. W. CONNER,
Chairman Board of Supervisors.

D. L. TANNER,
Town Clerk.

(Across the face in red ink:) $70.

STATE OF MINNESOTA,
County of Ramsey, ss:

E. G. Rogers came before me personally, and, being duly sworn, doth say that he is one of the attorneys for the plaintiff in the above-entitled action; that the foregoing pleading is true to the best of his knowledge, information, & belief, and that the reason why this affidavit of verification is not made by said plaintiff is that he is absent from the county of Ramsey, Minnesota, where reside his attorneys, and further saith not.

E. G. ROGERS.

Subscribed & sworn to before me on this 19th day of February, A. D. 1878.

[NOTARIAL SEAL.] C. S. ROHRER,
Notary Public, Minn.

(Endorsed:) Filed February 20, 1878. H. E. Mann, clerk.

19 UNITED STATES OF AMERICA,
District of Minnesota, ss:

I hereby certify that I served the annexed summons on the thereinnamed defendant by handing to and leaving with J. T. Sargent, chairman of the board of supervisors of said Town of Red Rock, personally a true copy thereof at Red Rock, in said district, on the 25th day of February, 1878.

R. N. McLAREN,
U. S. Marshal,
By M. B. JOHNSON,
Deputy.

Marshal fees, $16.70.

20 *Summons.*

UNITED STATES OF AMERICA,
District of Minnesota, ss:

In the circuit court of the United States for the district of Minnesota.

JACOB A. HENRY
against
THE TOWN OF RED ROCK.

The President of the United States of America to the defendant above named, greeting:

You are hereby summoned and required to answer the complaint in this action, which has been filed in the office of the clerk of this court, in Saint Paul, county of Ramsey, and State of Minnesota, and file your answer in said clerk's office within twenty days after the service hereof, excluding the day of such service, and if you fail to answer the complaint as aforesaid, the plaintiff will take judgment against you for the sum of eighteen hundred and twenty dollars and interest on four hundred twenty dollars thereof from July 1, 1872, and interest on one hundred forty dollars thereof from July 1, 1874, and interest on four hundred twenty dollars thereof from July 1, 1875, and interest on four hundred twenty dollars thereof from July 1st, 1876, and interest on four hundred twenty dollars thereof from July 1, 1877, besides the costs and disbursements of this action. For the marshal of the district of Minnesota to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in said district of Minnesota, this 20th day of February, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence one hundred and third year.

[SEAL OF COURT] H. E. MANN, *Clerk.*

ROGERS & ROGERS,
Plaintiff' Attorney.

DISTRICT OF MINNESOTA, *ss:*

I hereby certify that the within is a true copy of the original summons delivered to me for service.

U. S. Marshal.

(Indorsed:) United States circuit court, district of Minnesota. No. J. A. Henry, plaintiff, vs. The Town of Red Rock, defendant. Summons. Filed February 27, 1878. H. E. Mann, clerk. Rogers & Rogers, plaintiff' attorneys.

21 United States circuit court, district of Minnesota.

JACOB A. HENRY
against
THE TOWN OF RED ROCK.

For answer to the complaint in this action, the defendant avers that it has no knowledge or information sufficient to form a belief as to the residence or citizenship of the plaintiff.

2nd. Defendant admits and avers the fact to be that during the time stated in the complaint, it was, and has been, and now is, a public municipal quasi corporation, organized for township purposes only, under and by virtue of the general laws of the State of Minnesota, and situated in the county of Mower, in said State.

Third. The defendant denies that at the time stated in the complaint, or at any time, it duly made or delivered to the Southern Minnesota
22 Railroad Company, or any one, any of the bonds or coupons set out or referred to in the complaint, but admits that at the date therein stated, to wit, the ninth day of March, 1871, certain persons, assuming and professing to act as the supervisors and town clerk of said defendant town, did make and deliver certain papers of substantially the tenor of those set out in the complaint. And defendant alleges that said action was had, and said pretended bonds and coupons were issued or attempted to be issued pursuant to and by virtue of certain authority claimed to have been conferred upon said town by an act entitled "An act to authorize the towns in Fillmore, Mower, Freeborn, Faribault, Martin, and Jackson counties to issue bonds to aid in the construction of any railroads running into or through said counties," approved March 6, 1868, and of an act entitled "An act to amend chapter twenty-four of the special
23 laws of one thousand eight hundred and sixty-eight, entitled "An act to authorize the towns of Fillmore, Mower, Freeborn, Faribault, Martin, and Jackson counties to issue bonds to aid in the construction of any railroads running into or through said counties,'" approved February 27, 1869, and distinctly purported on their face that they were so issued. And defendant avers that the said Southern Minnesota Railroad Company and all parties dealing with said bonds and the plaintiff were distinctly notified on the face of said bonds that all the authority claimed or possessed by the defendant town to issue said bonds or coupons, or any bonds or coupons, was by virtue of said acts.

That at the date of the issue of said pretended bonds and coupons, and for a long time prior thereto, said acts had been repealed by the legislature of the State of Minnesota, to wit, by an act entitled "An act to exempt the county of Dakota from the operations of chapter forty-five of the special laws of one thousand eight hundred and seventy, authorizing
24 certain counties to issue bonds to railroad companies," approved March 2, 1871, and at the date of the issue and delivery of said

pretended bonds and coupons, the only authority which said town possessed for the issue of any bonds in aid of railroad companies was by virtue of said last-named act and an act entitled "An act to authorize the townships, villages, towns, and cities in the counties of Mower, Dodge, Goodhue, and Dakota to issue bonds in aid in the construction of railways," approved March 5, 1870.

That none of the provisions of said last-named acts were complied with or attempted to be complied with, and the defendant had, at the time of the making, execution, and delivery of said pretended bonds and coupons, no authority whatever to issue said bonds pursuant to said acts, and did not claim to have any such authority, and said bonds on their face conveyed to the plaintiff, prior to his purchase and the assignment of
25 said bonds to him, if any such was ever made, notice that said defendant had not taken any of the necessary steps to acquire authority under said last-named acts, and did not claim *as* represent itself as having any such authority.

And the defendant avers that it has no knowledge or information sufficient to form a belief as to whether or not, before any of the coupons in the complaint fell due or matured, or at any time, the Southern Minnesota Railroad Company, for a valuable consideration to it paid, or otherwise, sold, assigned, or delivered the bonds or coupons in the complaint mentioned, or any of them, to the plaintiff.

Further answering, defendant avers that said pretended bonds and coupons were not issued in compliance with said laws of 1868 & '9, under which they purported on their face to be issued; that no town meeting, special or general, was regularly called as provided by said acts, and no such action of any such meeting as therein required was ever duly had, and such pretended bonds did not on their face purport or declare that such
26 action had been had by any such town meeting as was necessary by the terms of said laws to impart validity to said bonds or coupons.

And further answering, the defendant alleges that by the same legislature which enacted the amendment to the existing law in regard to the issue of bonds by said town in aid of railroad companies, a general law was enacted, entitled "An act to provide for the levy and collection of taxes in certain cases," approved March 6, 1871, which law was in force when the bonds in suit were made and delivered, and has ever since continued and now is the law of this State, by which a plain, adequate, and exclusive remedy for the collection of any bonds or coupons made and delivered or to be made and delivered by the defendant was provided, and, as defendant is advised, the control of taxation for their payment withdrawn from this defendant and vested in the authorities of the State and county, which remedy is exclusive of any other.

And further answering, defendant alleges that, prior to the issue
27 of the pretended bonds and coupons in suit, no provision had been made by the defendant town for the payment of the principal or interest of the whole amount or of any amount of said bonds or coupons, or of any amount which had been rated by it in conformity with the act of 1868 hereinbefore referred to, or otherwise.

And defendant denies that before the commencement of this action, or at any time, the said coupons in suit were duly presented for payment, or payment thereof duly demanded.

And defendant denies each and every other allegation in the complaint contained.

GORDON E. COLE,
Defendant's Attorney, Faribault, Minn.

STATE OF MINNESOTA,
County of Rice, ss:

J. T. Sargent, being duly sworn, says that he is the chairman of the board of supervisors of the defendant Town of Red Rock; that he has heard the foregoing answer read, and knows the contents thereof; that the
28 same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

J. T. SARGENT.

Subscribed & sworn to this 9th day of March, 1878.
[SEAL.] E. O. WHEELER,
Notary Public.

(Endorsed.) Filed March 11, 1878. H. E. Mann, clerk, by Wm. A. Spencer, dep'y.

29 United States circuit court, district of Minnesota.

JACOB A. HENRY
against
THE TOWN OF RED ROCK.

Agreed statement of facts.

It is hereby stipulated and agreed by and between the parties to this action that the following facts be deemed and considered in evidence in this action, subject to the same objections as to competency only as if regularly proven by oral proof or documentary evidence, and the special laws referred to may be read & used on the hearing as if regularly introduced in evidence. And it is further stipulated that a jury trial is hereby waived, and the case shall be submitted to and determined by the court upon the pleadings herein and said agreed statement of facts:

First. That the only vote of the legal voters of the defendant
30 township to issue the bonds in suit, or the coupons attached, was at a meeting of the voters of said township held on the fifteenth day of May, 1869.

That at that time chapter 24 of the special laws of Minnesota of the year 1868 and chapter forty-four, of the special laws of Minnesota of the year 1869 were in force, and were the only laws then in force which authorized the issue of said bonds.

And that no further or other action was taken or had at said meeting or by the said town, or the officers or voters, at any time except that prescribed by said laws and as hereinafter stated.

That no further action was had by said township, or any one undertaking to act for it, pursuant to said vote, and no bonds were issued by said township until the ninth day of March, 1871, when the bonds and coupons which are correctly set out in the complaint were issued, based upon and by virtue of the authority, if any, conferred by the vote of the fifteenth of May, 1869.

31 Third. That before said bonds were issued or delivered chapter

forty-five of the special laws of 1870 and chapter sixty-one of the special laws of 1871 had been passed, and had not been repealed at the time of the issue and delivery of said bonds.

The following are sections one and two of said last-named act:

"SEC. one. Each township, village, town, and incorporated city in the counties of Mower, Dodge, and Goodhue, by a vote of a majority of the supervisors of any township or of the majority of the city council of any such village, town, or city, subject to the approval and ratification of the legal voters of said township, village, town, or city, as hereinafter provided, may create and issue its bonds, with interest coupons attached, to aid in the construction of any railroad running into or proposed to be built through either or all the counties aforesaid.

"SEC. two. All acts and parts of acts inconsistent with this act are hereby repealed."

The said acts of 1868, 1869, 1870, and 1871 shall be considered
32 to be in evidence in this suit.

That no reference to or attempt to comply with the act of 1871, or the prior one of 1870, was made, the officers of said town supposing that the vote of 1869, being had under the laws then existing, was sufficient to authorize the issue of said bonds.

That the special act of 1871, already set out, was approved on the second day of March, 1871, and on the sixth day of March, 1871, the chapter seventeen of general laws of 1871 was approved.

The plaintiff had such notice as the recitals in the bonds and the laws referred to would be held to have given him, and no other.

That no vote of the supervisors of said town was had prior to the issue of said bonds in regard to their issue, and no action whatever was taken by the officers or voters of said town after the passage of the special laws of 1870 and 1871, hereinbefore referred to, reliance being had
33 solely upon the authority of the vote of the fifteenth of May, 1869.

After the issuance of the bonds described in the complaint, and before the maturity of the first coupons thereunto attached, the Southern Minnesota Railroad Company, which was then the holder thereof, sold and transferred and delivered the said bonds, with all the coupons appertaining thereto attached to the same, to the plaintiff, for the consideration of nine hundred dollars in money for each of said bonds, which money was forthwith paid by the plaintiff to said company.

At the time of such purchase, and the payment of such money, the plaintiff had no knowledge of any of the special acts of legislature hereinbefore mentioned, and no knowledge of any of the proceedings of the electors or other authorities of the said Town of Red Rock, except what he derived from the recitals contained in the said bonds.

At the time of the issuance of said bonds, the persons who re-
34 spectively signed the same as the chairman of the board of supervisors and the town clerk of such town were the officers they respectively purported to be, duly elected and qualified, and acted as such.

ROGERS & ROGERS,
Plaintiff's Attorneys.
GORDON E. COLE,
Def't's Att'y.

DEC. 2, 1878.

(Endorsed:) Filed Dec. 5, 1878. H. E. Mann, clerk.

35 United States circuit court for the district of Minnesota. Term minutes, December term, A. D. 1878. Dec. 19, 1878.

JACOB A. HENRY
vs.
THE TOWN OF RED ROCK.

This cause coming on for hearing before the court upon the pleadings and stipulation of the parties, by their attorneys, in writing, on file, and it appearing that the facts set forth in such stipulation are not sufficiently full to enable the court to satisfactorily dispose of the case, it is ordered, the parties, by their counsel, consenting thereto, that the stipulation be amended in this action, or that proof be taken showing whether or not any acceptance of the vote of 1869, in evidence, by the railroad company was had prior to the passage of the acts of 1870 or 1871, and what acts, if any, were had in regard thereto, with leave to plaintiff to insert causes of action on additional coupons maturing before now and next term, and with leave to plaintiff to show any further acts complying with subsequent statutes.

36 United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1879. June 23, 1879.

Present, Hon. John F. Dillon, Rensselaer R. Nelson, judges.

JACOB A. HENRY
vs.
THE TOWN OF RED ROCK.

This cause came on for trial before the court, without a jury, trial by jury having been waived by stipulation of the parties, in writing, on file, and the same was tried upon the pleadings, proofs, and stipulation of parties, and argued on the part of the plaintiff by W. P. Clough, esq., on the part of the defendant by Gordon E. Cole, esq., and submitted to the court, and taken under advisement.

37 United States circuit court, district of Minnesota.

JACOB A. HENRY
against
THE TOWN OF RED ROCK.

This action being at issue and reached in its order on the calander at the general term of said court, begun and holden in the United States court room, in the custom-house, in the city of Saint Paul, in said district, on the sixteenth day of June, 1879, before Hon. John F. Dillon, circuit judge, & hon. R. R. Nelson, district judge, the parties hereto having duly filed with the clerk of this court a stipulation in writing waiving a jury, and having been heard by said judges upon the annexed agreed statement of facts & the evidence of special laws introduced by the parties, & after hearing W. P. Clough, esq., on behalf of the plaintiff, and Gordon E. Cole, esq., on behalf of the defendant, we find the facts stated and agreed to in the annexed agreed statement of facts.

We further find as facts.

That on the 6th day of March, 1868, the legislature of the State
38 of Minnesota duly passed an act approved on that day entitled "An act to authorize the towns in Fillmore, Mower, Freeborn, Faribault, Martin, & Jackson Counties to issue bonds to aid in the construction of any railroads running into or through said counties," which was approved on said day.

That on the 26th of February, 1869, the said legislature duly passed an act, approved on that day, entitled "An act to amend chapter 24 of the special laws of one thousand eight hundred and sixty-eight, entitled 'An act to authorize the towns of Fillmore, Mower, Freeborn, Faribault, Martin, & Jackson Counties to issue bonds to aid in the construction of any railroads running into or through said counties.'"

That on the fifth day of March, one thousand eight hundred and seventy, the legislature of said State duly passed an act, which was approved on that day, entitled "An act to authorize the townships, villages, towns, and cities in the counties of Mower, Dodge, Goodhue, and Dakota to issue bonds in aid of the construction of railways."

That on the second day of March, one thousand eight hundred
39 and seventy-one, the legislature of said State duly passed an act, which was approved on that day, entitled "An act to exempt the county of Dakota from the operation of chapter forty-five of the special laws of one thousand eight hundred & seventy, authorizing certain counties to issue bonds in aid of railroad companies."

That on February 17, 1871, the said legislature passed an act entitled "An act to amend section one of chapter (43) forty-three of the special laws of one thousand eight hundred and seventy, relating to issuing bonds to aid in the construction of railroads."

That on March 6, 1871, the said legislature passed an act, entitled "An act to provide for perfecting the records of town meetings held under the provisions of chapter twenty-four of special laws of one thousand eight hundred and sixty-eight, relating to issuing bonds to aid in the construction of railroads."

That on the 9th day of March, one thousand eight hundred and seventy-four, the legislature of said State duly passed an act, approved on
40 that day, entitled "An act to exemp' the county of Mower from the operation of certain acts authorizing certain counties to issue bonds to railroad companies."

That said several acts being all the legislation in regard to the issuance of bonds in aid of railroads by the defendant town are to be deemed and taken as a part of these findings, to the same extent as if fully set out herein in words and figures.

And the circuit judge being of opinion that the plaintiff is entitled to judgment, as in the complaint demanded, judgment is ordered accordingly.

And it is hereby certified that in the trial of said action the following questions arose upon which the opinions of said judge, were opposed, to wit: 1st, to whether the act of March 5, 1870, hereinbefore referred to, operated as a repeal of the act of March 6, 1868, as amended by the act of February 26th, 1869, both also hereinbefore referred to; and 2nd, if so, whether the coupons in suit are void in the hands of the plaintiff

41 upon the facts hereinbefore found; and we accordingly state and certify the same, and direct said certificate to be entered of record.

Done at said general term begun and holden on the 16th day of June, 1879, as aforesaid.

JOHN F. DILLON.
R. R. NELSON.

42 In the circuit court of the United States for the district of Minnesota.

JACOB A. HENRY, PLAINTIFF,
ag'st
THE TOWN OF RED ROCK, DEFENDANT.

Amended stipulation.

It is hereby stipulated that a jury trial be, and the same hereby is, waived in the above entitled action, and that the same be submitted to the court, sitting without a jury, upon the arguments of counsel and the pleadings in the action and the matters set forth and referred to in this stipulation.

The following are to be taken and deemed to be the facts in the said action and in evidence therein, subject to the same objections on the grounds of incompetency and immateriality as if introduced in evidence in the usual course of procedure upon the trial of the action.

43 During all the period of time covered by the transactions involved in this suit the "Southern Minnesota Railroad Company" was a corporation existing under the laws of the State of Minnesota, and empowered to locate, build, maintain, and operate a public line of railroad extending from the Mississippi River westward across the territory of said State to the western boundary line thereof.

Prior to May 5, 1869, there had been constructed and put into operation by the said company a portion of its line of road, extending from Grand Crossing to Lanesboro', in Fillmore County, and another portion thereof extending from Ramsey, a point in that certain line of railroad then known as "The Minnesota Central Railroad," but now known as the "Iowa and Minnesota Division of the Milwaukee & St. Paul Railroad," to Wells, an interval of some sixty (60) miles being left wholly unbuilt between Lanesboro' and Ramsey.

44 The town of Red Rock lies between Lanesboro on the east and Ramsey on the west.

The village of Brownsdale, which had been laid out prior to the date last above mentioned, is situated in the town of Red Rock, and is principally situated on the northeast quarter of section nine and the northwest quarter of section ten in said town.

On or about May 5, 1869, the said company made to the said town of Red Rock the written proposition which is found in the transcript of proceeding', hereunto annexed and marked Exhibit A.

Thereafter the proceedings were had which are set forth in the said exhibit.

No other proceedings on the part of the town in the premises were had

prior to the issuance of the bonds in question, except a subsequent attempt to rescind the said action of the said town, which attempted rescinding proceedings took place on or about December, 1869, and failed to
45 secure the approval of a majority of the electors of said town present and voting at the election held upon the question of recission.

Prior to the time when the said bonds were issued the company never addressed any formal communication to the officers of the town accepting the terms and conditions on which the bonds had been voted; and its acts of acceptance of such terms and conditions, if any such acts there were, consisted of the following transactions:

In the fall of the year 1869 the company located its line of road between Lanesboro' and Ramsey, running through Brownsdale aforesaid and within the distance of 100 yards from the point fixed in the resolution passed for the issuance of the bonds, and in the month of December of that year let the contract for constructing such piece of road.

Work was begun upon that portion of the road so contracted for, lying between Lanesboro' and "The Summit," so called, a distance of ten
46 miles, toward Brownsdale, in December 1869, and was prosecuted through the winter of the same and following year.

In the spring of 1870 that portion of the line located the fall previous, extending westward from Spring Valley through Brownsdale to Ramsey, was relocated; but not so as to change its location in that part thereof running through Brownsdale.

In the spring and summer of 1870 the road was completed from Lanesboro' through Brownsdale to Ramsey upon the line located in the fall of 1869, as changed in the spring of 1870, and a depot was built as by the said resolution of the town was required.

The Southern Minnesota Railroad Company did not complete its road from what was its terminus in Fillmore County on the 15th day of March, 1869, to some point within one hundred rods of the southeast corner of the southeast quarter of section No. nine in township No. one hundred and three, range No. seventeen, nor into the defendant town, nor did
47 it establish a regular freight or passenger depot or any depot at such point or within the Town of Red Rock, defendant, nor did they do any business therefrom or in or for said town until after the fifth day of March, 1870, nor until after the passage of the act of that date referred to in the pleadings and stipulation, nor prior to July of that year.

After the issuance of the bonds described in the complaint, and before the maturity of the first coupons thereunto attached, the Southern Minnesota Railroad Company, which was then the holder of said bonds and coupons, sold, transferred, and delivered the said bonds, with all the coupons appertaining thereto attached to the same, to the plaintiff for the consideration of nine hundred dollars in money for each of said bonds, such price then being the full market value of the same, which money was
48 forthwith paid by the plaintiff to the said company. At the time of such purchase and payment of such money, the plaintiff had no knowledge of any of the special acts of legislature hereinbefore mentioned and no knowledge of the proceedings of the electors or other authorities of the said town of Red Rock except what he derived from the recitals contained in the said bonds.

At the time of the issuance of said bonds the persons who respectively

signed the same, as chairman of the board of supervisors and the town clerk of such town, were the officers they respectively purported to be, duly elected and qualified and acting as such.

Either party may introduce upon the trial any general or special law of the State of Minnesota which he or it is advised is or may be material to the questions involved in the suit.

The complaint shall be considered amended so as to include a
49 claim for recovery for and on account of all coupons held of the plaintiff, and which were issued with said bonds, that have matured since the commencement of this action.

ROGERS & ROGERS, &
W. P. CLOUGH,
Att'ys for Pl'ff.
GORDON E. COLE,
Att'y for Def't.

50 EXHIBIT A.

Whereas one of the supervisors and the town clerk, together with twelve other freeholders of the town of Red Rock, county of Mower, and State of Minnesota, have in writing filed in my office a statement that a special town meeting is necessary to the interest of said town:

The inhabitants, legal voters of said town of Red Rock, are therefore hereby notified that a special town meeting will be held at the school-house in Brownsdale, on the 15th day of May, 1869, at nine o'clock in the forenoon, for the purpose following, to wit: To vote aid in the construction of the Southern Minnesota Railroad through Mower County, pursuant to an act of the legislature of Minnesota, approved March 3, 1868, and amended 1869, reference being made to the proposition of Clark W. Thompson, gen'l manager of said company, a copy of which is hereto attached, being the object contained in the statement filed in my office.

Given under my hand, at my office, this 5th day of May 8, A. D. 1869.

(On margin:) Affidavits for posting this notice was recorded following this.

E. W. CONNER, *Clerk.*

51 *Thompson's proposition.*

I propose in the name of the Southern Minnesota Railroad Company to build and put in operation the Southern Minnesota Railroad from its present terminus in Fillmore County to some point on the Minnesota Central Railroad, on or before the 31st day of December, 1872, on the following conditions, to wit, that the following towns in Fillmore and Mower Counties shall vote and certify to the Southern Minnesota Railroad Company the following amount of bonds of their respective towns, payable in (20) twenty years, with seven per cent. annual interest:

Fillmore, $15,000; Spring Valley, $25,000; Frankford, $15,000; Grand Meadow, $15,000; Red Rock, $25,000; and Waltham, $15,000.

The bonds not to be delivered and the interest not to commence until the said completed road shall reach the town, or some point as far west as the

eastern line of the town voting the aid, if said road shall be done by the time specified.

CLARK W. THOMPSON,
General Manager.

Recorded May 22, 1869.

E. W. CONNOR,
Town Clerk.

52 STATE OF MINNESOTA,
County of Mower, ss:

E. W. Connor, being first duly sworn, deposes and says that on the 15th day of May, 1869, he was acting town clerk of Red Rock in said county and State.

That on said day a special town meeting was held in said town for the purpose of voting aid to the Southern Minnesota Railroad Company. That said meeting was duly and legally called, upon notice properly given, by posting said notices in five public places in said town ten days previous to said meeting.

That deponent was present at said meeting, and that the reason why deponent did not secure said notice and the proof of posting was that he did not think the same was necessary.

E. W. CONNOR.

Subscribed & sworn to before me this 15th day of March, 1871.
D. L. TANNER,
Town Clerk.

I, D. L. Tanner, town clerk of Red Rock, in county of Mower,
53 and State of Minnesota, do hereby certify that on the 15th day of May, 1869, a special town meeting was duly and legally held in said town of Red Rock, and at such meeting the following resolution was passed, to wit:

"Resolved, That under the provisons of an act of the legislature of the State of Minnesota, entitled an act to authorize the counties of Fillmore, Mower, Freeborn, Faribault, Martin, and Jackson to issue bonds to aid in the construction of any railroad running into or through said counties the supervisors of the town of Red Rock, Mower County, Minnesota, and their successors in office, be, and are hereby, authorized and required to issue and deliver *the* the Southern Minnesota Railroad Company the bonds of said town, with interest coupons attached, to the amount of $25,000, such bonds to bear interest at the rate of seven per cent. per annum, payable annually, such bonds to be issued in denomination of not less than $1,000 each, and to be payable in 20 years
54 from their date, and to be signed by the chairman of said board of supervisors and attested by the clerk of said town, whenever the said railroad company shall have completed its said road from its present terminus in Fillmore County to some point within 100 rods of the southeast corner of the northeast quarter of section nine (9) in township one hundred and three (103) north, of range seventeen west, and shall have established a regular freight and passenger depot, and are doing business therefrom.

These resolutions are recorded in town books separate from this aff. E. O. W.

"Resolved, That the bonds shall not be issued or delivered to said company, and no obligation whatever incurred by said town by voting of this resolution, unless said company shall have completed said road to said point by the 31st day of December, 1872."

That the Southern Minnesota Railroad Company duly performed all its conditions required by said resolution.

That said bonds were issued and delivered to said company on
55 the 9th day of March, 1871, by the chairman and town clerk of said town of Red Rock, under the directions of the supervisors of said town.

I further certify that there are 25 of said bonds of the denomination of $1,000 each, making $25,000 in all. Each bond is payable 20 years from date, and each is dated March 8, 1871. Each is payable to the Southern Minnesota Railroad Company, or bearer, and bears interest at the rate of seven per cent. per annum, payable annually on the first day of July of each year said bonds may run, commencing July 1, 1871.

In witness whereof I have hereunto set my hand this 11th day of March, 1871.

D. L. TANNER,
Town Clerk.

Recorded the 8th day of April, 1871.

L. L. LAMB,
Town Clerk.

In consideration that the town of Red Rock, in Mower County, Minnesota, shall deliver to the Southern Minnesota Railroad Company
56 its bonds to the amount of twenty-five thousand dollars, heretofore voted to aid said company in the construction of its line of railroad through said town of Red Rock, it is hereby agreed and stipulated by and on the part of said Southern Minnesota Railroad Company that in case said line of said road shall at any time be removed from said town, or changed from its present location, or in any way removed beyond the limit provided by the town in voting aid for the construction of said road, that then each and every of said bonds so to be issued shall be returned by said , to said town of Red Rock, and all interest paid thereon refunded.

Witness the corporate seal of said company and its manager the 8th, day of March, 1871, by his hand and seal.

[SEAL.] SOUTHERN MINNESOTA R. R.,
By CLARKE W. THOMPSON, [SEAL.]
Gen'l Manager.

(Endorsed:) Filed in my office this 9th day of March, 1871. Recorded on page 317 of the town book of records.

D. L. TANNER,
Town Clerk.

57 Board of supervisors met at the hotel in Brownsdale, March 9, A. D. 1871. Present, E. W. Conner and H. E. Tanner. Issued bonds to Southern Minnesota Railroad Company to the amount of twenty-five thousand dollars ($25,000), as per instruction of the town given by a

vote taken on the 15th day of May, A. D. 1869, said bonds being payable twenty years (20) after date, with interest at the rate of seven per cent. per annum, payable annually.

Adjourned to meet on roads on Monday, March 13, A. D. 1871. Recorded this 9th day of March, A. D. 1871.

D. L. TANNER,
Town Clerk.

(Endorsed:) Filed June 23, 1879. H. E. Mann, clerk.

58 Circuit court of the United States of America for the district of Minnesota.

JACOB A. HENRY
vs.
TOWN OF RED ROCK. } No. , . Term, 187 .

Judgment, , 187 . Damages, $. ,
attorneys.

Clerk's fees:

Writ, issuing & sealing	1 20
Filing papers, 46 oaths	4 60
Commissions, subpœnas,	
Entries and record, 54 folios	8 10
Certified copies, folios	
Complete record, 84 "	12 60
Dockets, indexes, and services	3 00
Receiving, keeping, and paying $	
Affidavits, certificate, and seal	
Calling and swearing jury, 75 cents; officer, 20 cents	
Report on assessment of damages, 75 cents	
Execution	1 20
	30 70

Marshal's fees:

On writ, ; subpœnas, ; writ of enquiry,	16 70

Witness fees:

Name,	,	days,	miles
"	,	days,	miles
"	,	days,	miles
"	,	days,	miles
"	,	days,	miles
"	,	days,	miles
"	,	days,	miles
Docket fee			10
			57 40

Costs taxed at $57.40.

, *Clerk.*

ST. PAUL, Aug. 22, 1879.

59 DISTRICT OF MINNESOTA, *ss:*

E. G. Rogers, being duly sworn, doth depose and say that the above bill and items of cost and disbursements are just and correct, and have been necessarily incurred therein.

E. G. ROGERS.

Sworn to and subscribed before me this August 22, 1879.

J. N. CARDOZO,
U. S. Commissioner.

AUGUST 22, 1879.

Notice of taxation of costs and of judgment waived.

GORDON E. COLE,
Def't's Att'y.

(Indorsed:) U. S. circuit court, district of Minnesota.
vs. . Bill of costs. Filed 187 .
clerk. $.

60 United States circuit court, district of Minnesota.

JACOB A. HENRY
vs.
THE TOWN OF RED ROCK.

This cause having been tried before the court without a jury, pursuant to the stipulation of the parties in writing on file, and the court having found all the issues in favor of the plaintiff, and ordered judgment to be entered in favor of the plaintiff and against the defendant for the sum demanded in the complaint, and the sum demanded in the complaint having been computed and ascertained by the clerk of this court to be the sum of two thousand eight hundred and twenty-one dollars and forty-six cents ($2,821.46), and the plaintiff's costs having been duly taxed at the sum of $57.40: Now, therefore, on motion of Messrs. Rogers & Rogers, plaintiff's attorneys, it is considered, ordered, and adjudged that the plaintiff do have and recover of and from the defendant the said sum of two thousand eight hundred twenty-one dollars and forty-six cents, be-
61 sides his costs and charges by him in and about his suit in this behalf expended, taxed at $57.40, and that the plaintiff have execution therefor.

Judgment record signed this 22d day of August, A. D. 1879.

H. E. MANN, *Clerk.*

D., 2,821.46; C., 57.40—$2,878.86.

(Endorsed:) Judgment roll. Filed August 22, 1879. H. E. Mann, clerk.

62 United States circuit court, district of Minnesota.

JACOB A. HENRY
against
THE TOWN OF RED ROCK.

Know all men by these presents that we, the Town of Red Rock as principal, and Leander Kirkland, Daniel D. Sargent, and Jas. T. Sargent, of the county of Mower, in the State of Minnesota, as sureties, are held and firmly bound unto Jacob A. Henry, plaintiff above named, in the sum

of five thousand dollars, to the payment of which, well and truly to be made to said Henry, his executors, administrators, and assigns, we firmly bind ourselves, our heirs, executors, and administrators firmly by these presents. Sealed with our seals this 16th day of August, 1879.

The conditions of this obligation is such that, whereas the above-named Jacob A. Henry did, at the general term of the circuit court of the United States, begun and holden within and for the district of Minnesota on the third Monday in June, 1879, recover judgment, to wit, on the 23d
63 day of June, 1879, in the sum of twenty-seven hundred and eighty-eight & $\frac{80}{100}$ dollars damages, being the sum demanded in the complaint, with coupons belonging, as in agreement of suit added by order of court, and dollars cost of said against the above-named defendant, the Town of Red Rock; and whereas the judges of said court having duly certified, as provided by law, that their opinions were opposed upon certain questions occurring at the trial of said suit, the defendant is about to remove said suit by writ of error to the Supreme Court of the United States:

Now, therefore, if the said Town of Red Rock, plaintiff in error as aforesaid, shall prosecute its said writ to effect, and if it shall fail to make its plea good, shall answer all damages and costs, then this obligation to be void; otherwise, in full force and effect.

TOWN OF RED ROCK, [SEAL.]
By G. L. CASE,
Chairman Board of Supervisors of Town of Red Rock.
LEANDER KIRKLAND. [SEAL.]
DANIEL D. SARGENT. [SEAL.]
JAS. T. SARGENT. [SEAL.]

64 STATE OF MINNESOTA,
County of Mower, ss:

Leander Kirkland, Daniel D. Sargent, & Jas. T. Sargent, being each duly sworn, doth each for himself depose and say that he is a resident and freeholder of said county and State; that he is worth the sum of two thousand five hundred dollars over and above all just debts and liabilities, and exclusive of his property exempt from execution.

LEANDER KIRKLAND.
DANIEL D. SARGENT.
JAS. T. SARGENT.

Subscribed & sworn to before me this 20th day of August, 1879.
[SEAL.] E. O. WHEELER,
Notary Public in and for Mower Co., Minn.

(Endorsed:) Bond and sureties approved, and supercedeas allowed.
R. R. NELSON,
Judge U. S. District , District of Minnesota.

Filed August 22, 1879. H. E. Mann, clerk.

(Indorsement on cover:) No. 134. The Town of Red Rock, plaintiff in error, vs. Jacob A. Henry. Minnesota C. C. U. S. Filed 1st November, 1879.

FILED
OCT 12 1882

SUPREME COURT

OF THE

UNITED STATES.

THE TOWN OF RED ROCK,

Plaintiff in Error,

VS.

JACOB A. HENRY,

Defendant in Error.

BRIEF AND ARGUMENT

OF PLAINTIFF IN ERROR.

GORDON E. COLE,

Attorney for Plaintiff in Error.

Pioneer Press.

SUPREME COURT OF THE UNITED STATES.

THE TOWN OF RED ROCK, PLAINTIFF, IN ERROR,

VS.

JACOB A. HENRY, DEFENDANT, IN ERROR.

BRIEF AND ARGUMENT OF PLAINTIFF, IN ERROR.

STATEMENT.

I.

On the sixth day of March, 1868, the Legislature of the State of Minnesota passed an act entitled an act to authorize the towns in Fillmore, Mower, Freeborn, Faribault, Martin and Jackson counties to issue bonds to aid in the construction of any railroads running into or through said counties, which act so far as material is as follows:

Sec. 1. Each town in the counties of Fillmore, Mower, Freeborn, Faribault, Martin and Jackson, is authorized to issue bonds as hereinafter provided to aid in the construction of any railroad running into, or proposed to be built through, either or all of the counties aforesaid.

Sec. 2. Said bonds shall be issued in sums of not less than one hundred dollars each, may bear interest at a rate not

exceeding ten per cent. per annum payable annually and shall run for a period not exceeding ten years from their respective dates. They shall be signed by the chairman of the board of supervisors, and countersigned by the town clerk of such towns; and the principal and interest as they become due shall be payable to the person or corporation to whom they shall be issued, or bearer on presentation to the town treasurer,

Sec. 3. Any town in either of the aforesaid counties, may at any usual or regularly called special meeting by vote of a majority of the legal voters of such town present and voting, fix the amount and size of bonds to be issued by such town, the rate of interest and the date of payment of all and any thereof and the person or corporation to whom the same shall be issued, and made payable, and the time at which, and the terms and conditions upon which the same will be issued, and such town may, at such meeting by vote, delegate all or any of the foregoing powers to the board of supervisors or any committee appointed by the town."

This act is chapter twenty-four of the special laws of Minnesota for one thousand eight hundred and sixty eight.

On February twenty-seventh, one thousand eight hundred and sixty nine, the legislature of said State passed an act entitled an act to amend chapter twenty-four of the special laws of one thousand eight hundred and sixty eighth entitled an act to authorize the towns of Fillmore, Mower, Freeborn, Faribault, Martin and Jackson counties to issue bonds to aid in the construction of any railroads running into or through said counties.

This act is chapter forty-four, of the special laws of Minnesota, for one thousand eight hundred and sixty nine, and the only change relevant to the controversy here was the substitution of the period of thirty years, not exceeding which, the bonds were to run, instead of ten as provided by the act of one thousand eight hundred and sixty-eight.

With these laws in force, the Southern Minnesota Railroad Company on or about May ninth, one thousand eight hundred

and sixty nine made the town of Red Rock the following proposition:

I propose in the name of the Southern Minnesota Railroad Company to build and put in operation the Southern Minnesota Railroad from its present terminus in Fillmore county to some point on the Minnesota Central Railroad, on or before the thirty-first day of December, one thousand eight hundred and seventy-two, on the following conditions, to-wit:

That the following towns in Fillmore and Mower counties shall vote and certify to the Southern Minnesota Railroad Company the following amount of bonds of their respective towns payable in twenty years with seven per cent. annual interest:

Fillmore, fifteen thousand dollars; Spring Valley, twenty-five thousand dollars; Frankfort, fifteen thousand dollars; Grand Meadow, fifteen thousand dollars; Red Rock, twenty-five thousand dollars and Walthan, fifteen thousand dollars; the bonds not to be delivered, and the interest not to commence until said completed road shall reach the town, or some point as far west as the eastern line of the town, voting the aid if said road shall be done by the time specified.

CLARK W. THOMPSON, General Manager.

On the fifteenth day of May, one thousand eight hundred and sixty nine, a special town meeting was held in said town of Red Rock at which the following resolution was passed:

RESOLVED: That under the provisions of an act of the Legislature of the State of Minnesota entitled an act to authorize the counties of Fillmore, Mower, Freeborn, Faribault, Martin and Jackson to issue bonds to aid in the construction of any railroad running into or through said counties, the supervisors of the town of Red Rock, Mower County, Minnesota, and their successors in office be, and are hereby authorized and required to issue and deliver the Southern Minnesota Railroad Company the bonds of said town with interest coupons attached to the amount of twenty-five thousand dollars, such bonds to bear interest at the rate of seven per cent. per annum payable annually; such bonds to be issued in denominations of not less than one thousand dollars each, and to be payable in twenty years from their date, and to be signed by the chairman of said board of supervisors and attested by the clerk of said town whenever said Railroad Company shall have completed its said road from

its present termination, Fillmore county, to some point within one hundred rods of the southeast corner of the northeast quarter of section nine in township one hundred and three, north of range seventeen west, and shall have established a regular freight and passenger depot and are doing business therefrom:

RESOLVED: That the bonds shall not be issued or delivered to said company, and no obligation incurred by said town by voting of this resolution unless said company shall have completed said road to said point by the thirty-first day of December, one thousand eight hundred and seventy-two.

See pages sixteen and seventeen of record.

No other proceedings of the town of Red Rock were had in the premises prior to the issuance of the bonds in controversy and prior to the passage of the act of March fifth, one thousand eight hundred and seventy, hereinafter set out.

The Southern Minnesota Railroad Company never addressed any formal communication to the officers of said town accepting the terms and conditions on which the bonds were voted, and never in any manner accepted said terms and conditions unless such acceptance could be implied from the fact that it located its line through the town in one thousand eight hundred and sixty nine, but relocated, though not so as to change the location through the town, in the next year, and in the fall that year began to work on a section at the east end of the line from Lanesborough, its then western terminus westerly, so far as appears it made no final location of its road through or to the town of Red Rock until after the passage of the act of March fifth, one thousand eight hundred and seventy, so that the only thing it did do before the passage of that act was to commence building a section of road remote from the town of Red Rock.

It did not complete its road to within one hundred rods of the point named in the resolutions of the town; it did not es-

tablish a regular freight and passenger depot, or any depot at such point,or within the limits of the town of Red Rock,and did not do any business therefrom,or in,or for said town prior to the passage of the said act of March, fifth, one thousand eight hundred and seventy,nor in any respect comply with the conditions precedent to the issue of said bonds imposed by said resolutions.

Page 15 record.

With matters in this condition with no further action on the part of the town or company than as just stated, the Legislature of the State of Minnesota passed an act entitled an act to authorize the townships, villages,towns and cities in the counties of Mower, Dodge, Goodhue and Dakota to issue bonds to aid in the construction of railways which act was passed on the fifth day of March, one thousand eight hundred and seventy, and so far as pertinent or material is as follows:

Sec. 1. Each township and village, town and incorporated city in the counties of Mower, Dodge, Goodhue and Dakota by a vote of a majority of the supervisors of any township, or of the majority of the city council of any such village, town or city as hereinafter provided, may create and issue its bonds with interest coupons attached to aid in the construction of any railroad running into or proposed to be built through either or all of the counties aforesaid.

Sec. 2. The majority of the supervisors of any township or the majority of the village, town or city council of any such village, town or city in the aforesaid counties may fix the amount and size of the bonds to be issued by said township, village,town or city, the rate of interest and the date of payment of all or any part thereof,and the person or corporation to whom the same shall be issued and made payable,and the time at which, and the terms and conditions upon which the same shall be issued to such corporation.

Sec. 3. Before the bonds are issued in any township or incorporated village, town or city, the question of issuing them shall be submitted to the legal voters thereof by the supervisors

of said township or by the council of said village, town or city. And the supervisors of townships and common councils of said villages, towns and cities, are hereby authorized to appoint and call special elections for such purposes, which elections shall be called and conducted in such form and manner as elections are usually conducted in such townships, villages, towns or cities. The voters at such elections shall use ballots upon which shall be printed or written or partly written and partly printed the words "for" railroad bonds, or the words "against" railroad bonds, as the voters shall choose; if the majority of the ballots so cast at such an election shall have upon them "for" railroad bonds; then the said bonds shall be issued and the said supervisors or the said common council shall cause the same to be delivered to the Railroad company or corporation whenever it shall have complied with the terms and conditions on which the bonds are issued; but if a majority of said ballots shall have the words "against" railroad bonds upon them, then the said bonds shall not be issued, provided that the question of issuing said bonds may again at any time or times be submitted in like manner to said legal voters with like effect:

Before the bonds in controversy were issued, to wit: On the second day of March, 1871, the Legislature of the State of Minnesota passed an act amendatory of chapter forty-five of the special laws of 1870, being the act last hereinbefore set out and which so far as material is as follows:

Sec. 1. That section 1 of chapter forty-five of the special laws of one thousand eight hundred and seventy be amended so as to read as follows:

Sec 1. Each township, village, town and incorporated city in the counties of Mower, Dodge and Goodhue by a vote of a majority of the supervisors of any township, or of the majority of the city council of any such village, town or city subject to the approval and ratification of the legal voters of said township, village, town or city as hereinafter provided, may create and issue its bonds with interest coupons attached to aid in the construction of any railroad running into or proposed to be built through either or all of the counties aforesaid.

Sec. 2. All acts and parts of acts inconsistent with this act are hereby repealed.

All of the acts hereinbefore set out have a section declaring that they shall take effect and be in force from and after their passage.

With these laws in force of 1870 and 1871, and nothing having been done in the premises, either by the town or company, other than as herein before stated, the supervisors of the town of Red Rock caused the bonds in controversy to be issued in the following form, and with the following recitals.

UNITED STATES OF AMERICA.

BOND OF ONE THOUSAND DOLLARS, ($1000.00.)

No. 22.

Being one of twenty-five bonds of like amount issued by the town of Red Rock, in aid of the Southern Minnesota Railroad Company, pursuant to chapter twenty-four of the special laws of Minnesota of 1868, as amended by chapter forty-four of special laws of Minnesota of 1869.

To all to whom these presents shall come the town of Red Rock in the county of Mower and State of Minnesota sends greeting.

Across the face in Red ink $1000.00.

Whereas by acts of the Legislature of the State of Minnesota, known as chapter twenty-four of special laws of Minnesota of 1868, and chapter forty-four of special laws of Minnesota of 1869, it is in substance enacted that each town in the counties of Fillmore, Mower, Freeborn, Faribault, Martin and Jackson is authorized to issue bonds as therein provided to aid in the construction of any railroad running into, or proposed to be built through either or all of said counties, with both provisions prescribing the form and amount of such bonds, and mode of voting the same, the time of payment, rate of interest and manner of providing for the payment of the same with other formalities, all of which have been fully complied with in respect to the issuing of these presents. And whereas at a special town meeting of the legal voters of said town duly called, and which was holden in and for said town on the fifteenth day of May 1869, it was resolved in pursuance of said acts by a majority of the legal voters of said town present and

voting, that said town should issue to the Southern Minnesota Railroad Company twenty-five thousand dollars in bonds.

In the form herein expressed and upon certain conditions which said company has since fully performed.

Now in consideration of the premises, the said town of Red Rock acknowledges to owe and promises to pay the said Southern Minnesota Railroad Company or bearer at or before twenty-years from the date hereof, the sum of one thousand dollars, lawful money of the United States on presentation of this obligation to the town treasurer of said town and also interest on that sum at the rate of seven per cent. per annum payable annually as long as said principal sum remains unpaid on like presentation from time to time to said treasurer of the respective proper interest warrants hereto attached as they severally mature, in testimony whereof the said town has caused these presents to be signed by the chairman of the Board of Supervisors and countersigned by its town clerk this 9th day of March, 1871.

(Signed,) E. W. CONNER,
Chairman of Board of Supervisors.

Countersigned,
D. L. TANNER, Town Clerk.

To this bond were attached cupons in the following form representing each installment of interest maturing from the date to the maturity of said bond $70, to the treasurer of the town of Red Rock, Minnesota:

Pay to the Southern Minnesota Railroad Company or bearer seventy dollars on the first day of July, 1872, for one year's interest on bond No. 22, issued March 9th, 1871, in aid of said Company.

E. W. CONNER,
Chairman of Board of Supervisors.

D. L. Tanner, Town Clerk.
Across the face in red ink $70.

See page 5 record.

After the issuing of said bonds and before the maturity of the first coupons, the bonds in controversy were sold and transferred by said company then the holder thereof, to the plaintiff for nine hundred dollars each, who took them with such notice as he was bound to take of the existence of the laws and legisla-

tion hereinbefore set out and with knowledge of the recitals on the face of the bonds and of the facts contained in said recitals and no other.

See page 15 record.

Upon this record the plaintiff in error assigns the following errors:

First.—As the acts of 1868 and 1869 did not authorize the town of Red Rock to make a contract preliminary to the issue of the bonds, but only to issue the bonds—their repeal by the act of 1870, which legislated upon the entire subject and required the concurrent judgment of both the supervisors and the electors in place of the single judgment of the electors, which was sufficient under the acts of 1868 and 1869—after the vote, but before any bonds were issued, and before the Railroad company had performed the conditions precedent, made necessary by the terms of the vote, or acquired a vested right to their issue, annuled all power in the town to issue the bonds, without the concurrent action of the supervisors and electors; and hence the judgment below sustaining the validity of the bonds and coupons in controversy was error.

Second.—As the recitals in the bonds expressly refer for the authority to issue them, to the acts of 1868 and 1869, and declare that they are issued pursuant to those acts by authority of a vote of the electors — and as the acts of 1870 and 1871 are public acts, or at least of such a character that the plaintiff was bound to take notice thereof, the plaintiff is charged with notice and is not a bona fide purchaser and it was error to sustain a recovery on the coupons by him.

In entering upon the discussion of these questions, I cannot ignore the strong inclination of this court to protect the rights

of purchasers and enforce upon unwilling municipalities, the strict performance of their contracts, nor the disfavor with which defences of actions upon such securities have usually been regarded by it.

But while no lover of a sound business morality can object to this tendency, he may with propriety remind the court that there is no tyranny like the tyranny of popular majorities, and that the rights of the minority who own most of the property and pay the heaviest taxes—will be absolutely at the mercy of popular caprice unless the courts zealously insist upon the observance of all the checks and safeguards, designed for their protection. It surely cannot be immoral for these, when popular excitement has subsided and the control of town affairs has passed to them, to urge a disregard of those checks and safeguards in defence of an action upon such securities. The first question which confronts us, is; Did the act of 1870 operate as a repeal of those of 1868 and 1869?

The latter had authorized the issue of bonds upon a popular vote merely—the supervisors were merely the ministerial officers by whom so many or few of the duties, incident to carrying into effect the popular voice as the town meeting chose to delegate to them, were to be performed.

No discretion was vested in them. Now comes the act fo 1870 and, without expressly repealing prior laws, professes to legislate upon the entire subject of the issue of municipal bonds by the towns of Mower county. It is elementary that laws professing to legislate upon the entire subject operate by necessary implication as a repeal of all prior laws on the subject.

See Murdock v. *City of Memphis*, 20 *Walllace* 590. *U. S.* v. *Tynen* 10 *id.* 88. The act declares the conditions on which bonds of the towns of Mower county shall thereafter be voted.

Each town in the counties of Mower etc., by *a vote of a majority of the supervisors subject to the approval and ratification of the legal voters*, may create and issue its bonds to aid in the construction of any railroad running into, or proposed to be built through, *either* or all of the counties aforesaid.

Chap. 45, special laws of Minnesota, 1870.

Counsel attempted to make a point below upon the difference in the grouping of counties in the two acts—one indicating as was claimed, a north and south road, and the other an east and west one; but this fanciful geographical inference is an attempt to incorporate an altogether novel rule into the canons of statutory construction.

But if such an inference were as safe and practical as it is unsafe and fanciful, it would fail here, because the aid is not to be granted to a road running through *the counties* named, or all the counties named, but through *either*. If it runs through Mower, no matter where else it runs, it may touch none of the associate counties; still the vote of the supervisors and electors must concur before bonds can be legally issued in aid of a railroad running into, or through the county. Now this wise provision is altogether nugatory and inoperative, if a vote of the electors under the act of 1868 is still sufficient. Under the rule "*Expressio unius est exclusio alterius*," the declaration that the town may issue its bonds by a vote of its supervisors, subject to the approval and ratification of the legal voters is equivalent to saying that it may *not* issue them without a compliance with these conditions. To the extent that the act of 1868 permits the issue without the vote of the supervisors, to that extent it is inconsistent with that of 1870, and both cannot stand together but the former must give way.

Second. The only authority conferred on the town by the acts of 1868 and 1869 was to issue bonds and prescribe the terms and conditions. No authority was conferred upon them to make any other contract. They could not bind themselves to issue bonds in future by a valid contract—and the Railroad, if it did anything on the faith of the mere vote, was presumed and bound to know the law, and knowing, to know that whether the bonds could ever be issued must depend upon the state of the law when the attempted issue should be made; the bare vote created no liability and furnished no basis upon which rights could vest. The legislative power to repeal, amend or modify the existing law without regard to what had been done under it continued until the bonds were actually issued, or at least until the Railroad Company had performed all the conditions precedent required by the vote and thus secure a present right to demand the immediate issue and delivery of the bonds. Whether this, indeed, or anything short of the actual issue of the bonds, would be sufficient to cut off the Legislature's right to repeal or amend, it is unnecessary to discuss—as none of the conditions precedent required by the resolution of the town meeting of 1869 were performed prior to the passage of the act of 1870. See *folio* 47, *page* 15; *and folio* 54, *page* 17, *record*.

This proposition seems to find support in a series of decisions of this court, from whence analogies to the facts in this case can be deduced so close as to defy any attempt at distinction. Thus in *Aspinwall* v. *Commissioners of* the County of Daviss, 22 How. 379, the act authorized a vote of the electors upon the question of subscription to the stock of a railroad. The vote was had, but

before an actual subscription, a new constitution went into effect prohibiting the subscription.

Bonds were held void in the hands of a bona fide purchaser, there the act contemplated the subscription and issue of bonds in payment therefor as simultaneous acts, and the Court held that that was the only contract authorized, and if the law was repealed before *that* contract was consummated, no bonds could lawfully be issued afterwards. Here the law contemplated no contract except that created by the bonds themselves. They were issued as a gratuity instead of a subscription to stock, and until they were issued there could be no contract which would be protected from invasion by sec. 10 of art. 1 of the Constitution of the United States.

In the Town of *Concord* v. *Savings Bank*, 2 Otto, 625, the town was authorized, as in this case, to issue bonds to aid a railroad company as a gratuity, provided the electors should so vote. The election was had and resulted favorably to the issue of the bonds; but before the bonds were actually issued, the authority to issue them was withdrawn.

The court say "the act of donation may have been an authority for a donation at any time prior to July 2, 1870 (that being the date at which the new constitution took effect withdrawing the power) and no authority at all afterwards and such, we think, it was.

The popular vote in favor of an appropriation was on the 20th of November, 1869; *but it was not itself an appropriation. or donation.*

A person eager to escape from the authority of the latter case, here might, it is true, note the distinction that there the town had no authority to issue the bonds until the railroad had been completed to it.

Here, what was incorporated in the enabling act, in that

case was incorporated in the vote of the town, and until the road was completed as required by the vote, no obligation arose but the court in the case cited put its decision on the ground that a mere vote although accepted by the Railroad Company is not the appropriation or donation, and that is the only thing authorized or contemplated. A vote to issue the bonds when the road is completed is not a contract to deliver them at that time and if, when the time arrives the authority no longer exists, no bonds can be legally issued—the point in these cases—as in the case at bar, is that the town is authorized to make one specific contract, to-wit, the bonds, but not to make an agreement in advance to issue bonds.

It is true that the last case has been reversed; not because the Court erred, but because the Supreme Court of Illinois having sustained the bonds, this court by a recognized rule of comity simply adopted the holding of the Illinois Court.

In Wadsworth v. *Supervisors*, 12 *Otto*, 534, the question presented on this record arose on demurrer to a bill on equity to compel the issue of municipal bonds.

A vote of the electors had been had under authority of law, but before the supervisors had actually issued the bonds, the law authorizing their issue was repealed.

It was alleged in the bill and admitted by the demurrer, that the company constructed its road through the county at a cost in grading and in the purchase of ties exceeding the sum of fifty thousand dollars. That such work was done, and such money expended upon the faith of the aid voted and with the full understanding and belief that the bonds would be issued and delivered to the company, and that the company would not have built the road and expended the money except in reliance upon an issue of the bonds as authorized by statute.

The court, after stating that the case was controlled by that of *Aspenwall* v. *Commissioners*, 22 *Howard*, 364, cited ante, which involved says the court, the validity of certain county bonds which were in the hands of *bona fida holders for value*, say "we held in that case that the popular vote did not itself create a vested right in the railroad company to the bonds." The court, it is true, make the point that the statute did not make it imperative on the supervisors to issue the bonds pursuant to the vote—but left the issue discretionary with them, but say: "if we should be mistaken in this construction of the statute—if the statute had, in terms made it the duty of the supervisors—to issue bonds to the extent indicated by the popular vote, we should be bound, upon the authority of *Aspinwall* v. *the Commissioners*, to hold that the legislature could at any time before the bonds were in fact issued, or before the county came under a legal obligation to issue them (which in the case at bar could only be when all the conditions precedent to their issue prescribed by the popular vote had been performed by the company) repeal as it did the statute conferring the power to issue and thereby withdraw from the supervisors all power in the premises—and the demurrer was sustained.

But the latest and most decisive utterance of this court is the case of *Railroad Co.*, v. *Falconer*, 13 *Otto*, 821.

In that case, under a statute of New York, a petition of the taxpayers of a town expressing the desire that the town should create and issue its bonds, and invest the same or the proceeds thereof, in the stock of a certain railroad company, upon the condition that the line of the railroad of said company should be located and constructed through the said town before said bonds shall be delivered to said company or sold, was presented to the county judge who appointed commissioners pursuant to the statute to prepare and execute the bonds in the name of the town, and in its name to subscribe for the stock of the company, and exchange the bonds therefor or the proceeds thereof—the commissioners were authorized by the statute to enter into an agreement with the railroad company, for lim-

iting and defining the times when, and proportion in which the bonds should be delivered, and the places where and purposes for which the bonds should be applied.

The commissioners entered into an agreement with the railroad company by which they agreed that when the railroad company should have located and constructed its road through the town, they would immediately subscribe for the stock and pay for it by issuing and delivering said bonds.

The railroad was constructed through the town; but before it was so constructed through the town an amended constitution went into effect, by which the authority to issue such bonds was withdrawn, unless a valid contract for their issue existed, which was protected by the Constitution of the United States. Before the constitution went into effect, the route of the road had been surveyed and a map filed thereof—and the court states the question for decision thus:

"The question then is whether at that time (to-wit; when the amended constitution went into effect), under the circumstances above detailed, the railroad Company had acquired by contract a vested right to have and receive the town's subscription to its stock and a delivery of the bonds in payment thereof."

And say "we are clearly of opinion that the agreement made by the commissioners with the Railroad Company was *ultra vires*. Their powers were confined to subscribing for the stock and making and issuing the bonds in payment thereof, when and as in the petition of the taxpayers directed—that is when the road was completed through the town.

By the act they might also stipulate as to the installments in which the bonds should be delivered, and the purposes for which they might be applied; but the power to do this being but an incident of the principal power to issue the bonds, and being only intended to prescribe the times and manner of their issue and the uses to which they should be applied, would not properly arise and could not be effectually exercised until the principal power itself arose and become exercisable.

Whilst, however, the commissioners had the power, or rather

would have the power at the prescribed time to subscribe for the stock and to execute and deliver the bonds, neither the statute nor the taxpayer's petition gave them any power to make a contract to subscribe for stock, nor a contract to deliver bonds to the Railroad Company. They were not charged with any such duty; they were not invested with any such power.

All that was done by the town through the action of its taxpayers, was to appoint agents for making a subscription and issuing bonds on the happening of a certain event. When that event should happen it would be the duty of those agents to execute their commission. The conditions which were imposed required something to be done by the Railroad Company before the commissioners could act; but no stipulation was demanded of the Company or given by it that this something should be done. The two parties were not brought together. There was no mutuality between them; each was free to act as it listed.

That was the condition of things, when the new constitution went into operation prohibiting all municipal aid to corporators or individuals by subscription of stock or otherwise.

It seems to us therefore, that the New York Court of Appeals was right in deciding that no contract existed at that time.

The railroad company may have expected a subscription when their road should be completed, but they had no subscription nor any valid contract that any would be made. Everything was inchoate and undetermined up to the first of January, 1875 (the time when the amended constitution went into effect), and then all power to subscribe for stock was taken away from the town.

The taxpayers had no authority to make a subscription of stock or to issue bonds or to make any contract to do so, the commissioners had no power to act for no power was given them to act until the road was located and completed through the town.

It is believed that this reasoning is of exact application here. The petition of the taxpayers stands in place of a vote of the electors. Neither is authorized to make a contract, but to express a desire that bonds issue subject to such conditions as they see fit to impose.

The resolution of the electors did not accept Thompson's

proposition, but added many other and more onerous conditions; the company never was asked to or did accept them and had not performed them when the act of 1870 passed withdrawing from the town the power of issuing bonds in the manner provided by the act of 1869 and substituting another and better mode. The supervisors were constituted by the law and the vote, the mere agents of the town, to issue the bonds in the manner and of the character prescribed in the resolution; but this power did not arise until the conditions precedent should be performed and had not arisen when the act of 1870 withdrew all power of action under the law of 1869.

This case is stronger than that of *Railroad Company* v. *Falconer*, in this; that here the supervisors never attempted to make any contract whatever with the Railroad company.

III.

An act precisely similar to that of 1870, chapter 45, special laws of 1870, has received a construction by the supreme court of this state, which if it becomes material here will be followed by this court:

They say "The statute provides in terms that a town may by a vote of a majority of its supervisors subject to the approval and ratification of its legal voters, create and issue its bonds to the amount named and for the purposes indicated and pledges its faith for their payment.

The vote of the supervisors and the ratification by the voters were both essential to the creation of any valid obligation against the town, neither is sufficient without the other, an approval by the electors of a proposition submitted to them, without any prior favorable decision by the supervisors, would be a nullity and of no avail. It was the obvious purpose of these provisions, to serve as a check upon any hasty and inconsiderate action, whereby the town might under the influence of any temporary excitement and delusive expectations be led to assume greater burdens of taxation and indebtedness than its

taxable resources would be able to sustain, and in construing these provisions, it is the clear duty of the court to give effect, so far as possible, to this legislative intent.

The vote of the supervisors which is provided for must therefore be regarded as something more than a mere formality.

It required them in the first instance before submitting to the electors any proposition for aid, to determine favorably the question whether under the circumstances the town ought to grant it, and this upon their own independent judgment and descretion—exercised, honestly and in good faith, for the benefit of the town."

State v. *City of Lake City*, 25 *Minn.*, 125.

IV.

The plaintiff cannot be regarded as a bona fide purchaser. The recitals on the face of his bonds and their date expressly notified him that on the 9th day of March, 1871, these bonds were issued, pursuant to the acts of 1868 and 1869 and by authority of the vote of the special town meeting held on the 15th day of May 1869.

County of Bates v. *Winter*, 7 *Otto*, 91.
Ogdin v. *County of Davis*, 12 *Otto*, 639.
McClure v. *Oxford*, 4 *Otto*, 429.
Town of Concord v. *Savings Bank*, 2 *Otto*, 627.

While the recitals informed him that the the bonds were issued in accordance and by the authority of the acts of 1868-9 and pursuant to a vote in 1869 when a vote of the electors was all that was required—the act of 1870 informed him that when the bonds were issued the prior independent vote of the supervisors must be superadded to the vote of the electors—and the act of 1871 chapter 61 special Laws of 1871, that at the time the bonds were issued, all the acts inconsistent with the above requirement had been expressly repealed.

"Dealers in municipal bonds are charged with notice of laws of the state granting power to make the bonds they find on the market."

Anthony v. *County of Jasper*, 11 *Otto*, 693.

But the acts of 1870 and 1871 are general laws of which every one is bound to take notice; they apply to every municipality in a number of counties in the State of Minnesota.

Mr. Sedgwick, the best modern authority, says of such laws:

In this country the disposition has been on the whole, to enlarge the limits of the class of public acts and to bring within it all enactments of a general character, or which in any way affect the community at large; the subject has been considered with reference to the provisions of the federal constitution and it has been held that the establishment of towns and counties and their boundaries, court houses, jails, bridges and ferries and all matters of public policy and acts relating to them, are of course public acts.

Acts too, which, although affecting only a particular locality, apply to all persons, are public acts. Thus an act for the survey of timber in the County of Penobscott in the State of Maine,or relating to the preservationof a particular fish in Dunstan river in Massachusetts—were held public,and generally if the act affects in any way the public interests it will be held public.

P. P. 32-33, Sedgwick on Statutory and Constitutional Law.

1 Dillon, Municipal Corporations, see 83, (50).

V.

It only remains to allude to certain acts which Counsel have introduced, and from which they seek to draw the most unwarrantable inferences.

Chap. 62 of Special Laws of 1871, when any town affected by chap. 43 of Special laws of 1870 has agreed to issue and deliver to any Railroad Company its bonds, upon the perform-

ance by said Company of conditions, and such town be divided, and a new town shall be erected, provides for distributing the taxation to pay the bonds ratably between them and the act of 1870 to which it refers, is an amendment of chapter 24 and Laws of 1868, providing in all cases where towns affected by that act have been divided, for the taxation to pay the bonds of all the territory included in the town at the time of voting the bonds.

The Counsel seeks to extract a legislative construction of what would be valid action under the act from these acts. Such construction, if such were had, could be of no avail in determining the true construction; but it is evident that the legislature gave that matter no thought, but were providing for an equitable adjustment of such taxation, if any, as might legally be had.

He has also introduced Chapter 60 of Special laws of 1871, an act to provide for the perfecting the records of town meetings held under the provisions of the act of 1868 and acts amendatory thereof which provides for perfecting by affidavit the record of any town meeting at which bonds shall have been or may hereafter be voted under Chapter 24 of the Special laws of 1868 or the acts amendatory thereof.

Also Chapter 53 of Special laws of 1874 which exempts the county of Mower from all the acts authorizing the issuing of bonds in aid of railroads enumerating the acts of 1868—9, 1870—1, and declares that this act shall not affect any bonds heretofore issued.

The counsel seeks to extract from these acts an inference that the legislature thought that the act of 1868 was still in force. —Suppose it did?—and this court should think differently. It

is merely an attempt to control judicial construction by that of the legislature.

But in the last act, the legislature intended absolutely to withdraw power from the municipalities of Mower County to issue bonds for railoard purposes, and, without attempting to anticipate or consider what the decision of the court would be as to the status of the law on the subject, from abundant caution enumerated them all. While in the act providing for prefecting records of town meetings, the language "when bonds have been or shall hereafter be voted under the act of 1868 or the acts amendatory thereof," treats the act of 1870 and 1871, as in fact they are, as amendatory of that of 1868 and does not by any means assume that the act of 1868 exists except as amended by those of 1870 and 1871.

GORDON E. COLE,
Attorney for plaintiff in error.

OFFICE SUPREME COURT U. S.
FILED
NOV 29 1882
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 134.

THE TOWN OF RED ROCK,
Plaintiff in Error,

vs.

JACOB A. HENRY,
Defendant in Error.

Brief for Defendant in Error.

The Act of Legislature of March 6, 1868 (*Sp. Laws, Minn.*, 1868, *Chap.* 24), *had not been repealed when the bonds in question were issued.*

It is claimed that this statute was repealed by the Act of March 5, 1870 (*Sp. Laws, Minn.*, 1870, *Chap.* 45).

The last mentioned statute does not contain any repealing clause. It does not profess to abrogate any existing legislation whatever.

Hence, if it repealed the Act of 1868, such repeal was effected solely by *implication.*

Repeals by that process are not favored. Before an existing statute can be treated as impliedly set aside by a later one, the inference that the Legislature meant such a thing to occur must be irresistible.

The methods which implied repeals are effected are two :

1. Repugnancy between the two statutes.

2. Revision of the entire subject of the earlier statute by the later one.

Between the two statutes under view there is certainly no conflict.

The Act of 1868 prescribes a mode by which towns in a group of counties may contract debts for a specified object.

The Act of 1870 prescribes a somewhat different mode whereby towns in another group of counties may incur debts for a similar object.

Now, there is nothing inconsistent in the existence of more than a single mode of incurring municipal indebtedness for like objects.

A town or county may, with perfect consistency, be clothed with power to create debts, in aid of railroad enterprises, by a dozen totally different modes.

Hence, where the towns of a given county are already authorized to issue their bonds in aid of railroad construction, the passage of another act, not containing any repealing clause, and not referring to existing legislation, cannot be treated as repealing the latter, on account of repugnancy, merely because it permits the same thing to be done in a somewhat different way.

Permitting a thing, already allowable, to be done in a different way from that presently prescribed, does not prohibit its being done in the present way. If the thing be done in *either* of the prescribed ways, it will be well done.

Hence, the Act of 1868 has not been abrogated by the Act of 1870 on the ground of incompatibility.

Neither has the former of those acts been abrogated by the latter, because of a revision of the

entire subject of the former by the latter. The cases wherein repeals of such sort have been recognized have been very few indeed. The three or four which the learned counsel has cited in his brief comprise about all to be met with in the reports.

And none of those cases afford much aid in arriving at any general rule upon the subject.

Probably no *general* rule upon the point can be framed.

The intent of the Legislature in each instance of a supposed revision of the subject of an existing statute, can most safely be ascertained by taking into view all the attending facts.

But, in every instance, according to the very terms of the rule, the latter act must purport to revise the *whole subject* covered by the former. It must appear upon its face to embody the entire will of the Legislature upon the subject treated.

Now, in so far as the statutes under view are concerned, there is surely nothing upon the face of the Act of 1870 showing an intent by the Legislature to revise the whole subject of the Act of 1868; nor, indeed, any part of the subject covered thereby.

On the contrary, those two acts show upon their faces, designs upon the part of the Legislature to afford aid to two distinct enterprises.

The first thing upon the face of each act that arrests the attention, is the fact that each of them relates not to the single county of Mower, but to a group of counties, and that of those groups Mower is the only county common to both.

The Act of 1868 relates to the counties of Fillmore, Mower, Freeborn, Faribault, Martin and Jackson.

Those counties extend in a line from *east* to *west*, in the order named in the act, along the southern boundary of the State.

On the other hand, the Act of 1870, relates to the counties of Mower, Dodge, Goodhue and Dakota.

Those counties extend in a line from *south* to *north*, in the order named in the act ; beginning at the southern boundary of the State and terminating at the Mississippi river, opposite St. Paul.

The lines of the two groups of counties therefore cross each other at right angles.

The well-known status of railroad enterprises in the State at the dates of the passage of the two acts, shows conclusively that the grouping of counties made by them was not accidental ; but, on the contrary, was the work of design.

The Southern Minnesota Railroad had, some years prior to the passage of the Act of 1868, been projected to extend from the Mississippi river, in the county of Houston, westward, across that county, and across each of the several counties named in that act. The United States had granted lands to aid in the construction of that road, and the portion thereof extending through the county of Houston, and into the county of Fillmore, had actually been built.

Printed Record, pp. 14–15.

On the other hand, it is well known that, shortly prior to the passage of the Act of 1870, at least two distinct lines of railroad—the "Dubuque and St. Paul," and the "Davenport and St. Paul"—had been projected to run from points in Iowa to St. Paul, over routes lying mostly, if not wholly, in the four counties named in that act.

It cannot be doubted, therefore, that the subject intended by the Legislature to be covered by the Act of 1868, was the aiding of a line of railroad running from east to west, across the counties named by that act ; nor that the subject meant by the Legislature to be covered by the Act of 1870, was the aiding of a line of railroad extending from St. Paul, southward to the southern boundary of

the State, across the four counties, named in that act.

Possibly, the Act of 1868 might have been adequate authority for towns in the county of Mower to issue bonds in aid of a north and south line.

But an act had to be passed to authorize the counties of Dodge, Goodhue and Dakota to issue bonds in aid of such a line; and the county of Mower was included, either as a matter of precaution, to make its authority to aid a north and south line perfectly clear, or else because the existence of the Act of 1868 was overlooked by the draughtsman of the bill for the later act.

Surely, the purpose of the Act of 1870 was not to revise the law upon the subject of the issue of railroad aid bonds in Mower county, and to supersede prior laws relating to that subject.

That the Legislature had no design, while passing the Act of 1870, to thereby abrogate the Act of 1868, is shown by the subsequent express repeal of the latter-named Act.

By Chapter 53, of the Special Laws for the year 1874, the prior Act of 1868, as well as that of 1870, was expressly repealed.

The repealing act was in the following terms :

An Act to Exempt the County of Mower from the Operation of certain Acts authorizing certain counties to issue bonds to railroad companies.

Be it enacted by the Legislature of the State of Minnesota :

SECTION 1. That none of the provisions of Chapter twenty-four of the Special Laws of 1868, Chapter forty-four of the Special Laws of 1869, and Chapter forty-three of the Special Laws of 1870, amendatory thereof, Chapter forty-five of the Special Laws of 1870, and Chapter sixty-one of the Special Laws of 1871, amendatory thereof, shall apply to or be operative in the county of Mower, and none of said Acts or any Acts amendatory thereof, shall be construed as authorizing said county or towns therein, to issue bonds to aid railroad companies.